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NO. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HERMAN BLUM CONSULTING ENGINEERS, INC.
Petitioner,

v.

CARL M. HADRA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. Whether the court of appeals contravened the standards enunciated by this court in *Gasoline Products Co.* v. *Champlin Refining Co.*, 51 S.Ct. 513, 283 U.S. 494, 75 L.Ed. 1188 (1931), by its holding that the trial court was not in error when it limited the second trial in this cause to the issue of damages.

2. Whether or not the trial court's order granting a new trial as to damages only denied petitioner the full measure of its rights to trial by jury as guaranteed by the 7th Amendment to the *Constitution of the United States.*

3. Whether or not the trial court's order granting a new trial as to damages only was, on the record, an abuse of discretion as a matter of law.

4. Whether or not the trial court transgressed the limits of Rule 59, *Fed. R. Civ. Proc.*, by granting a new trial limited to damages only.

LIST OF PARTIES

The following are parties in the trial and appellate courts whose judgments are sought to be reviewed:

1. Herman Blum Consulting Engineers, Inc., the defendant-petitioner.

2. Carl M. Hadra, the plaintiff-respondent.

SUBJECT INDEX

List of Authorities i

Reference to Official Reports 1

Grounds of Jurisdiction 2

Constitutional Provisions and Rules of Procedure Involved 2

Statement of the Case 3

A. Facts Giving Rise to the Controversy 3

B. The First Trial; the Partial New Trial 6

C. The Decision of the Court of Appeals 9

Reasons Why the Writ Should Issue 10

1. A limited retrial is not a constitutionally permitted option unless certain criteria are affirmatively established by the record 10

a. Wholly unrelated issues 11

b. Proper jury functioning 12

2. As a matter of law, an absence of interdependence between liability and damages does not clearly appear on this record; indeed, the interrelationship is manifest 14

a. Hadra's character and credibility 14

b. Blum's good faith in context 15

c. Multiple damage theories 17

3. There is reasonable doubt that the jury functioned properly 18

a. Compromise 18

b. Confusion of issues 19

Conclusion 20

Appendix

LIST OF AUTHORITIES

Ajax Hardware Mfg. Corporation v. Industrial Plants Corporation, 569 F.2d 181, 184-185 (2nd Cir. 1977) 12, 13, 19

Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc., 513 F.2d 407, 422 (D.C. Cir. 1975) 13, 15, 18, 19

Caskey v. Village of Wayland, 375 F.2d 1004 (2nd Cir. 1967) 19, 20

Constitution of the United States, 7th Amendment 2

Federal Rules of Civil Procedure, Rule 59 2

Federal Rules of Civil Procedure, Rule 59(a) 10

Feinberg v. Mathai, 60 F.R.D. 69, 70-71 (D.C. Penn. 1973) 12, 19

Franchi Construction Co. v. Combined Insurance Co., 580 F.2d 1, 7-8 (1st Cir. 1978) 12, 17

Fury Imports, Inc. v. Shakespeare Co., 554 F.2d 1376 (5th Cir. 1977) 20

Gardner v. Vogel, 237 F. Supp. 119 (D.C. Penn. 1964) 19

Gasoline Products Co. v. Champlin Refining Co., 51 S.Ct. 513, 283 U.S. 494, 75 L.Ed. 1188 (1931) 9, 10, 11, 13

Geffen v. Winer, 244 F.2d 375, 376 (D.C. Cir. 1957) 12

Grimm v. California Spray-Chemical Corporation, 264 F.2d 145 (9th Cir. 1959) 19

Hadra v. Herman Blum Consulting Engineers, Inc., 632 F.2d 1242 (5th Cir. 1980) 1

LIST OF AUTHORITIES — (Continued)

Hatfield v. Seaboard Airline Railroad Company, 396 F.2d 721, 723-724 (5th Cir. 1968) 12, 19

Haug v. Grimm, 251 F.2d 523 (8th Cir. 1958) 19

Jamison Co. v. Westvaco Corporation, 530 F.2d 34 (5th Cir. 1976) 20

Korbut v. Keystone Shipping Co., 380 F.2d 352, 354 (5th Cir. 1967) 12, 15

Richardson v. Communication Workers of America, 530 F.2d 126, 130 (8th Cir. 1976) 12, 15

Romer v. Baldwin, 317 F.2d 919, 922-923 (3rd Cir. 1963) 12, 13, 16

Rosa v. City of Chester, PA, 278 F.2d 876, 883 (3rd Cir. 1960) 12

Shuerholz v. Roach, 58 F.2d 32 (4th Cir. 1932) 19

28 U.S.C., §1254(1) 2

28 U.S.C., §2101(c) 2

United Airlines v. Weiner, 286 F.2d 302, 306 (9th Cir. 1961) 12, 15

Vizzini v. Ford Motor Co., 569 F.2d 754, 760-761 (3rd Cir. 1977) 12, 13, 19

Williams v. Slade, 431 F.2d 605, 608-609 (5th Cir. 1970) 12, 13, 19

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To The Honorable Supreme Court of The United States:

Comes now Herman Blum Consulting Engineers, Inc., as petitioner, pursuant to Supreme Court Rule 21 and submits the following in support of its petition for writ of certiorari to review a decision and judgment of the United States Court of Appeals for the Fifth Circuit:

REFERENCE TO OFFICIAL REPORTS

The official reference to the decision of the Court of Appeals is: *Hadra* v. *Herman Blum Consulting Engineers, Inc.*, 632 F.2d 1242 (5th Cir. 1980).

GROUNDS OF JURISDICTION

The jurisdictional bases upon which the petition is founded are:

a. The opinion and judgment of the court of appeals are dated December 17, 1980. (See Appendix A & F.)

b. Time for filing a motion for rehearing was extended to January 14, 1981. A motion for rehearing was served January 9, 1981, and overruled by order of the court on January 27, 1981. (See Appendix F.)

c. Under 28 *U.S.C.*, §2101(c), the time period for filing this petition runs to April 27, 1981.

d. The jurisdiction of the Court is invoked under 28 *U.S.C.*, §1254(1).

CONSTITUTIONAL PROVISIONS AND RULES OF PROCEDURE INVOLVED

Provisions of law applicable to the case are:

a. The 7th Amendment to the *Constitution of the United States* which, in pertinent part, provides:

> "In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

b. That part of Rule 59, *Fed. R. Civ. Proc.*, which states:

> " *** A new trial may be granted . . . on all or part of the issues . . . in an action in which there has been a trial by jury *** "

STATEMENT OF THE CASE

Hadra brought this diversity suit against Blum, under Texas law, for breach of a contract of employment. (R. 226.) *

The case was tried to a jury which returned a verdict of liability favorable to Hadra but awarding "0" consequential damages for the breach of contract. (Tr. 632-635.) The trial court granted a new trial limited to damages for the breach. (R. 327-328; Appendix B.) The second jury trial resulted in a verdict awarding consequential damages of $97,205.10, making no allowance for failure to mitigate. (II Tr. 259-260.) This finding, along with other sums not pertinent here, was the basis of a judgment against Blum for $121,705.09. (R. 406; Appendices C and E.)

The court of appeals affirmed. (632 F.2d 1242.)

The facts which are the basis of the cause of action and the issues brought forward here are:

A. Facts Giving Rise to the Controversy.

Blum is a large, impressively qualified firm of consulting mechanical and electrical engineers. (Tr. 6-18.) In 1974, Blum hired Hadra as an engineer under a five-year contract at an annual salary of $30,000.00 per year. (Tr. 33-34.) Simultaneously Blum purchased Hadra's engineering firm in Phoenix for $50,000.00 to be paid in

* "R" refers to the volume of pleadings; "Tr." refers to the transcript of proceedings in the first trial; "II R" refers to the volume of proceedings in the second trial. Petitioner has requested from the clerk of the court of appeals that these items be certified to this court in conjunction with consideration of the petition.

five annual installments of $10,000.00 over the life of Hadra's employment contract. (Tr. 33-34.)

In early 1974, Blum, as a result of previous business contacts, was invited by Westinghouse and Hughes Aircraft to explore the possibility of providing its consulting services to a major project in Iran. (Tr. 121-122.) Hadra was assigned to pursue the opportunity. (Tr. 47-48.) Over a period of several months, commencing May of 1974, Hadra negotiated with Iranian authorities and ultimately, in September of 1974, concluded a contract to provide mechanical drawings and engineering supervision relative to construction of a weapons manufacturing facility in Shiraz, Iran. (Tr. 47-48, 124-125.) The price for the plans was $320,000.00; the cost of one supervising engineer was $130,000.00. (Tr. 125-126.)

In October of 1974, Hadra and Blum renegotiated Hadra's contract to provide for Hadra to represent Blum in Iran for two years at $130,000.00 annually. (R. 231; Tr. 127, 225-229.) It was further agreed, however, that the contract would be null and void if the Shiraz project ceased. (Tr. 50-53, 128.)

The purpose of Hadra's new assignment was twofold: first, to provide the supervisory services contracted for the Shiraz project; second, and equally important, to solicit new business in Iran where the influx of petrodollars into the country had created an unparalleled explosion in the construction industry. (R. 234; Tr. 231, 238-239, 268-269.)

Hadra assumed his new duties in December of 1974. (R. 231.) He performed the technical aspect of his employment well enough. (R. 135.) However, Herman Blum grew disenchanted with Hadra's marketing ef-

forts. (Tr. 132-137, 484.) He went to Iran personally, in February of 1975, and consulted with Hadra, firmly making known his requirements on the marketing aspect of their arrangement. (Tr. 133-138.) No increase in new business being forthcoming, and deeming there was no improvement in Hadra's marketing efforts, Blum dispatched its marketing manager, Ken Wallace, to Iran in July of 1974 to further evaluate the situation. (Tr. 143.) After a period of observation, Wallace concluded Hadra had no organized marketing plan and was not pursuing future contracts with any degree of skill or effort. (Tr. 485-490.) Consequently, he presented Hadra a letter (R. 231) which stated:

> "A decision has been made by Herman Blum Consulting Engineers, Inc. to terminate your employment in Iran upon the delivery of this letter to you by Ken Wallace effective immediately."
>
> * * * * *
>
> "We simultaneously offer you employment in our Dallas office in the position of Project Design Engineer under the direction of Mr. Fernando Meneses." (Tr. 146, 301-302.)

Feigning as an excuse reliance upon an illusory tax credit for foreign employment, to which he was never able to show himself duly entitled (Tr. 361; II Tr. 126-157), Hadra deposited himself and his family on the island of Majorca where he languished for approximately ten months (Tr. 363), as he said, " *** huddled over a radiator more than we went on the beach. *** " (II Tr. 16, line 3.) Hadra subsequently made repeated representations that this stay was an " *** extended vacation in Spain. *** " (E.g., Tr. 425-426.) While he engaged with others in academic discussion of em-

ployment in Iran (Tr. 416), he made no serious effort to obtain any of the abundant engineering jobs available at the time in the country. (Tr. 503; II Tr. 171-177.) Indeed, Hadra entertained the notion, albeit erroneous, it was illegal for him to work in Iran. (II Tr. 17, 20.) Although he did some wool gathering about ethereal, potential projects in various countries (Tr. 361-362), he did not obtain employment while on Majorca nor did he make serious effort in that regard. (Tr. 361-363, 420.) In fact, he stated that he believed it was illegal for him to work anywhere in Europe (II Tr. 16-17) and that it was his intention actually to remain on Majorca " *** (u)ntil the 510 days tax advantage ceased. *** " (Tr. 420, line 7.) Hadra stipulated that his " *** first efforts to find new employment were in August, 1976, when he returned to Phoenix, Arizona *** " (R. 236), which was *after* the expiration of the term of his contract as found by the jury. (R. 236, Stipulation #30.)

This suit resulted and the issues formed around the foregoing course of events.

B. The First Trial; the Partial New Trial.

The first trial was lengthy, complex, and contentious. The controlling issues were hotly contested. The intangible qualities of Hadra's job performance and the sincerity of his efforts to mitigate damages were the subject of bitter disagreement. The credibility of all parties was made a central issue.

The first jury was asked to enter this Serbonian bog and untangle the morass via a general charge and special interrogatories — in response to which it found:

1. Blum and Hadra cancelled their first contract by the 1974 agreement. (Tr. 632.)
2. Blum did not " *** re-assign *** " Hadra to Dallas. (Tr. 633.)
3. Hadra performed the 1974 Iranian assignment in a " *** satisfactory manner ***." (Tr. 633.)
4. The 1974 agreement was intended to be null and void when and if the Shiraz Project was completed (which ultimately proved to be January 31, 1976). (Tr. 633-634.)
5. Hadra suffered "0" consequential damages as a result of his termination. (Tr. 634.)

The district court entered judgment on that verdict for $24,500.00, representing certain sums Hadra was due for the purchase by Blum of his business and for unreimbursed expenses while in Iran (R. 299-300), but, just as quickly, the court set aside the judgment by reason of the "0" damage finding. (R. 327-328.) The order granting new trial recited:

> " *** The court feels that the jury based upon the evidence before them could have inferred that plaintiff might have mitigated within sometime after he was terminated, but could not have inferred the amount by which he could mitigate it (sic) would have equaled or exceeded the lower limit of his contractual damages. *** " (R. 327-328.)

The significant aspect of the order was that the new trial was limited to " *** the damages plaintiff suffered as a result of defendant's breach. *** " (R. 328.)

The case proceeded to trial again — ostensibly to determine damages, although Hadra was permitted to extol the competency of his performance (II Tr. 18),

to excoriate the injustice in his termination (II Tr. 25-26), and, under the guise of showing bias or interest, to explore substantial facts and circumstances concerning *his* version of the termination. (II Tr. 190-207.) Blum was sternly rebuffed when it made even the most oblique reference to those circumstances. (II Tr. 54-55.)

As the second trial was premised upon a breach by Blum, the company's principal defense, obviously, was mitigation of damages. What Hadra did, or did not do, in mitigation by seeking gainful employment was relatively undisputed. At issue was *why* it had taken him so long to become re-employed in the otherwise effulgent market for engineers prevailing at the time in Iran. (II Tr. 170-177.) This issue, in turn, was dependent upon Hadra's peculiar vocational philosophy, his character, his competency, his industriousness, and the motivation behind his actions *vis a vis* the pursuit of his vocation — all of which was inextricaby tied to the circumstances surrounding his employment and the basis for his termination in Iran. Not being able to show this, Blum was rendered an impotent sparring partner for whatever punches Hadra wished to throw.

To make matters worse, the second trial provided the occasion for the district court to change the rules of the game in so far as mitigation was concerned. Whereas in the first trial, the court had charged that damages from any breach of contract by Blum should be reduced by sums Hadra " *** could or should through the exercise of due diligence have earned through other employment *** " (Tr. 613) over the remaining life of the contract, in the second trial this duty was confined to a " *** geographical area [not]

unreasonably distant from his usual place of employment. *** " (II Tr. 246.) As Hadra had voluntarily abandoned his " *** usual place of employment *** " (Iran) in pursuit of the elusive tax credit, and was further operating on the assumption it was illegal for him to work in Iran and throughout Europe, the new instruction, in context, virtually took mitigation out of the case.*

Under the limitations imposed in the second trial, the outcome was predictable. Whereas the first jury (which heard all the evidence and was able to assess the motivation of all parties in context) had a low assessment of Hadra's efforts in mitigation, the second jury (which was given only a small peek at the entire relationship between the parties) reached a diametrically opposite result, giving Hadra literally every penny he asked for. (II Tr. 259.) Judgment was entered accordingly. (R. 406, Appendix E.)

C. The Decision of the Court of Appeals.

The court of appeals gave but cursory attention to Blum's point complaining of the partial new trial. Giving lip service to the *Champlin* criteria, it approved partial retrial by reasoning: (i) that the verdict was not "compromise" in nature, since no jury misconduct was shown and (ii) that liability and damages were " *** separate *** ", failing in the latter instance to

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* While Blum believes, along with the dissenting justice below (632 F.2d 1247, et seq), that this instruction is a grave misinterpretation of Texas law, it recognizes such issues are not generally deemed "certworthy". The error is a factor, however, which is rightfully looked to to underscore the harm resulting from the partial new trial.

give the benefit of its reasoning or justify the conclusion in terms of the record. (632 F.2d 1246.)*

Hence this appeal upon that point!

REASONS WHY THE WRIT SHOULD ISSUE

1.

A limited retrial is not a constitutionally permitted option unless certain criteria are affirmatively established by the record.

The issue posed by Blum's petition does not question the district court's constitutional power, under approximate circumstances, to order a new trial restricted to damages. The constitutionality of such procedure under the 7th Amendment was decided long ago in *Gasoline Products Co. v. Champlin Refining Co.*, 51 S.Ct. 513, 283 U.S. 494, 75 L.Ed. 1188 (1931), and the power has been enabled in federal court by the provisions of Rule 59(a), *Fed. R. Civ. Proc.*

The issue, instead, is *when* the power may be exercised. Blum's petition asks: Are there constitutional criteria, and what are they, which trigger the right to utilize the power of partial retrial?

The initial and pervasive fallacy of the court of appeals' approval of the use of the procedure here lies

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* "*** Blum, however, points to no circumstances, such as those listed in *Hatfield*, that indicate the possibility of a compromise verdict and concedes in its brief that jury misconduct was unlikely here. Moreover, the question of whether Hadra was wrongfully terminated is separate from the issues of how much he would have made under his contract and could have made in other reasonably obtainable employment. Thus where, as here, the jury's findings on questions relating to liability were based on sufficient evidence and made in accordance with law, it was proper to order a new trial only as to damages. ***" (632 F.2d 1246)

in its failure to answer that threshold constitutional question. Its fallacious approach begins at the end of the problem and reasons backwards; i.e., it accepts that the power was exercisable, *ab initio*, and then it searches the record only to determine if it conclusively impugns what it deems a simple exercise of discretion by the trial court.

That approach cannot be reconciled with the *Champlin* doctrine. If anything is clear from that opinion, it is that the inquiry in these cases starts with the assumption that partial retrial is *never* to be indulged *unless* certain factual criteria are shown to exist. In support of that proposition, one need look no further than the *Champlin* court's holding that:

> "Where the practice permits a partial new trial, it may *not* properly be resorted to *unless* . . . " (283 U.S. 500, 75 L.Ed. 1191, emphasis added.)

The word " *** unless *** " clearly renders the power conditional. Case law has developed two negative criteria, operating in an either/or tandem, on the establishment of which — and only upon the establishment of which — the power of retrial becomes an available option, viz:

a. *Wholly unrelated issues:* The first requirement is that there be no interrelationship of issues. The issue to be separately tried must be totally distinct from other issues in the case. This prerequisite is found in the *Champlin* opinion, itself, when it says:

> " *** partial new trial . . . may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. *** " (283 U.S. 500, 75 L.Ed. 1191.)

The separation must be absolute. Even a tangential connection or a philosophical overlapping is sufficient to foreclose utilization of the partial retrial procedure. See *Richardson v. Communication Workers of America*, 530 F.2d 126, 130 (8th Cir. 1976); *Franchi Construction Co. v. Combined Insurance Co.*, 580 F.2d 1, 7-8 (1st Cir. 1978); *United Airlines v. Weiner*, 286 F.2d 302, 306 (9th Cir. 1961); *Korbut v. Keystone Shipping Co.*, 380 F.2d 352, 354 (5th Cir. 1967); *Williams v. Slade*, 431 F.2d 605, 608-609 (5th Cir. 1970).

b. *Proper jury functioning:* Secondly, there must be no suggestion that the first verdict was a compromise of the jurors' conflicting viewpoints on liability and damages nor can there exist the possibility that the jury was affected by factors which caused defective deliberations. *Vizzini v. Ford Motor Co.*, 569 F.2d 754, 760-761 (3rd Cir. 1977); *Ajax Hardware Mfg. Corporation v. Industrial Plants Corporation*, 569 F.2d 181, 184-185 (2nd Cir. 1977); *Hatfield v. Seaboard Airline Railroad Company*, 396 F.2d 721, 723-724 (5th Cir. 1968); *Feinberg v. Mathai*, 60 F.R.D. 69, 70-71 (D.C. Penn. 1973).

In the fifty years since *Champlin* was decided, federal courts have taken heed to " *** proceed with caution *** " in finding that the power to partially retry exists. E.g., *Romer v. Baldwin*, 317 F.2d 919, 922-923 (3rd Cir. 1963); *Geffen v. Winer*, 244 F.2d 375, 376 (D.C. Cir. 1957); *Rosa v. City of Chester, PA*, 278 F.2d 876, 883 (3rd Cir. 1960). This court's unequivocal admonition that the prerequisite criteria must " *** clearly appear[] *** " (283 U.S. 500, 75 L.Ed 1191) has been taken at face value. While the phrase " *** clearly appears *** " is not otherwise defined in the

Champlin opinion, it has been applied to require a *positive* showing that the two prerequisite factors do *not* exist, *Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc.*, 513 F.2d 407, 422 (D.C. Cir. 1975), that their *total* negation must be " *** plain *** ", *Romer v. Baldwin*, supra, at 922, virtually to the point of being beyond a reasonable doubt. *Camalier & Buckley- Madison, Inc. v. Madison Hotel, Inc.*, supra at 422; *Ajax Hardware Mfg. Corporation v. Industrial Plants Corporation*, supra, at 185 — (" *** the reasonable *possibility* of a compromise verdict warranted a new trial on all issues. *** ") As aptly summed up in *Williams v. Slade*, supra, 431 F.2d 605 (5th Cir. 1970):

> " *** a court may properly award a partial new trial only when the issues affected by the error could have *in no way* influenced the verdict on those issues which will not be included in the new trial. *** " (431 F.2d 608, emphasis added.)

While cases may be found which say that a district court's order for partial retrial is reviewable only for abuse of discretion, *Vizzini* v. *Ford Motor Co.*, supra, 569 F.2d 754, 760 (3rd Cir. 1977), *Champlin*, and cases following it, make clear that the power to indulge that discretion does not arise until the record sufficiently negates interrelationship of issues and/or jury dysfunction. The district court does not, as the court of appeals seems to imply, have "discretion" in ascertaining whether the state of the record invokes the power of partial retrial; that determination is subject exclusively to the objective, stringent standard of *Champlin*.

This is the crux of the lower court's error, because, as we now show, by no stretch of the imagination can it be said that a total absence of interdependent issues

or jury dysfunction "*** clearly appears ***" on the face of this record.

2.

As a matter of law, an absence of interdependence between liability and damages does not clearly appear on this record; indeed the interrelationship is manifest.

The fundamental interdependence of liability and damage issues in this suit, sufficient to pre-empt the right to order partial retrial, is found in the following factors:

a. *Hadra's character and credibility:* There was utter disagreement as to Hadra's performance of the non-technical aspects of his Iranian assignment. According to him, complaints as to his administrative efficiency were untrue or entirely Blum's fault. (Tr. 252-272.) He pictured himself as devoting effective efforts to the procurement of new business (Tr. 238, 280-295) to the point of producing "*** several million dollars ***" for Blum. (II Tr. 18, line 24.) According to Blum and Wallace, on the other hand, Hadra defaulted on the administrative requirements of his job (Tr. 133-135) and his marketing efforts were wholly ineffective, if not nonexistent. (Tr. 135-143, 166-168, 478, 485-495.)

This testimonial dispute over liability issues called into question Hadra's character, his industriousness, his competency, and, significantly, his credibility as a witness. These same traits bore directly upon, and thus interrelated with, the sufficiency of his efforts at mitigation, the motivation for his conduct after termination and the believability of his testimony as to those efforts. These traits, in other words, permeate the entire case and are not subject to isolation on partial retrial, as is

clearly seen in such cases as *Richardson* v. *Communication Workers of America*, supra, 530 F.2d 126 (8th Cir. 1976), *Korbut* v. *Keystone Shipping Co.*, supra, 380 F.2d 352 (5th Cir. 1967), *United Airlines* v. *Weiner*, supra, 286 F.2d 302 (9th Cir. 1961), where the nature of the overall conduct of the parties, their character, and their credibility were intangible but common threads which linked liability and damages sufficiently to preclude partial retrial.

b. *Blum's good faith in context:* Another important factor binding liability and damages together is the element of Blum's good faith in its actions taken in the context of the parties overall dealings.

Blum proved, from its standpoint, that its actions in terminating Hadra in Iran were based upon good cause, sound business judgment, not determined precipitously, but premised upon careful, thoughtful evaluation. (Tr. 135-143, 168, 485-495, 585-586.) Hadra, of course, disagreed and supported his disagreement with his own assessment. (Tr. 238, 280-295.)

This element of motivation and good faith had its impact upon both liability and damages. The district court's limitation of the scope of the second trial and his instruction to the jury that Hadra "*** was terminated by Mr. Blum ***" had the potential for verifying Hadra's view that his termination not only was without cause but was attended with evil motive (Tr. 272, 304, 311, 365, 409; II Tr. 25-26), possible slander (II Tr. 12), and obstruction of justice (Tr. II 191-192) — liability factors which Hadra liberally capitalized upon in the second trial to increase damages.

The decision in *Camalier & Buckley-Madison, Inc.* v. *Madison Hotel, Inc.*, supra, 513 F.2d 407 (D.C. Cir.

1975), demonstrates why there is an invariable relationship between liability and damages in a complex contractual dispute where there are claims, counterclaims, myriad issues and theories of damage, questions of mitigation, and testimonial disputes. The following passage from that case, which likewise involved an allegedly wrongful contract termination and the issue of mitigation, could just as easily be speaking of our case in its elucidation of the error of partial retrial, to wit:

> "We think these instructions, albeit inadvertently, may have so distorted the postural image of the litigation in the jury's mind that its verdict cannot safely be accepted as a proper award of damages should *Camalier* prevail on retrial of the issue of liability. The unelucidated statement that Madison's 'conduct breached [Camalier's] rights' may well have led the jury to erroneously believe that the dispute over relocation of Camalier's shop had been legally resolved against Madison, and that Camalier was inexorably entitled to remain in its quarters in the hotel building; and that false notion, in turn, could have impermissibly influenced the jury's award of damages. It could have aggravated the amount which the verdict included for lost profit; it could have settled for the jury Camalier's bona fides in renewing the lease for a second five-year term; it could have dictated the jury's conclusion on mitigation of damages, as well as on punitive damages. In calling attention to the more conspicuous probabilities of prejudice, we do not suggest that the list is exhaustive." (513 F.2d 422.)

See also, *Romer* v. *Baldwin*, supra, 317 F.2d 919, 923 (3rd Cir. 1963), further emphasizing the critical relationship between the jury's understanding of liability and its assessment of damages ("* * * such awareness

is in itself a significant safeguard against capricious or cavalier treatment of the issue of damages. ***" — 317 F.2d 923.)

c. *Multiple damage theories:* Finally there is the numerity of Hadra's damage theories. His suit encompassed more than compensatory damages from his termination. It included sums due from the purchase of his business, allegedly unreimbursed business expenses, loss of tax benefits, even loss on the sale of a boat and other personal possessions. (R. 226-227.) These elements could only be fairly judged in relation to one another, and all were integrally involved with the parties negotiations and the factual context out of which their agreement arose which, in turn, is inseparable from the issue of contractual liability. The court determined some of these elements in light of the resolution of liability, but left others for the second jury. As succinctly observed in *Franchi Construction Co.* v. *Combined Insurance Co. of America*, supra, 580 F.2d 1 (1st Cir. 1978), on the propriety of partial retrial in such a context:

> " *** the action may not be splintered in that fashion. In order to render informed findings as to each item in dispute, the triers of fact would have to hear testimony about all of the parties' dealings under contract. The testimony about individual items was not distinct and separable from but rather was interwoven with the damages questions raised and resolved at the first trial. The trial court's emphasis on a possible economic benefit to be realized in conducting a resumed trial must yield to the injustice resulting herein trying interconnected damages issues separably to different juries.*** " (580 F.2d 8.)

As did the court in *Camalier*, supra, we do not suggest that the possible bases of interrelationship between liability and damages discussed above is exhaustive. Blum does believe it gainsaid, however, that the interrelationship exists so patently that any potential power to partially retry died a'borning.

3.

There is reasonable doubt that the jury functioned properly.

If the court of appeals is correct in its holding that there was *no* evidence at the first trial by which the jury could find any failure to mitigate on Hadra's part, then, the jury wholly disregarded its instructions to base its verdict upon evidence. (Tr. 602-605.) There are two possible explanations for that presumed disregard and the consequent finding of "0" consequential damages, to wit:

a. *Compromise:* For the jury to have honestly believed there was a breach, for it to have awarded some damages ($4,500.00) as a result of that breach, but to have denied (upon a barren record) the major portion of damages raises the suspicion, indeed the high degree of likelihood, that the verdict represents a compromise between conflicting viewpoints.

In that regard, it is important to note that verdicts which are set aside for inadequate damages are the ones invariably thought to be compromise in nature. Indeed, inadequate damage cases form virtually the entire foundation for the "compromise" verdict enjoinder against the power of partial retrial. See *Williams* v.

Slade, 431 F.2d 605 (5th Cir. 1970); *Caskey* v. *Village of Wayland*, 375 F.2d 1004 (2nd Cir. 1967); *Grimm* v. *California Spray-Chemical Corporation*, 264 F.2d 145 (9th Cir. 1959); *Shuerholz* v. *Roach*, 58 F.2d 32 (4th Cir. 1932); *Haug* v. *Grimm*, 251 F.2d 523 (8th Cir. 1958); *Hatfield* v. *Seaboard Airline Railroad Co.*, 396 F.2d 721 (5th Cir. 1968); *Gardner* v. *Vogel*, 237 F. Supp. 119 (D.C. Penn. 1964); *Feinberg* v. *Mathai*, 60 F.R.D. 69 (D.C. Penn. 1973).

The extreme factual disputes, the extent to which good faith and fair dealing of both parties was at issue, the complex nature of the parties' arrangements, the extent to which liability was to be resolved on those intangible issues are too suggestive of compromise to be ignored. It at least cannot be said beyond any doubt that the jury deliberations were not so affected. Blum would remind that it is not its burden to demonstrate "compromise" to the exclusion of all other possibilities. It need only show that compromise is a reasonable explanation for the verdict. *Camalier & Buckley-Madison, Inc.* v. *Madison Hotel, Inc.*, supra, at 513 F.2d 422; *Vizzini* v. *Ford Motor Co.*, supra, at 569 F.2d 760-761; *Ajax Hardware Mfg. Corporation* v. *Industrial Plants Corporation*, supra, at 569 F.2d 185.

b. *Confusion of issues:* The only possible alternative to compromise is confusion of issues by the jury.

While the jury was instructed that the standard for judging breach of an employment contract was termination "*** without cause ***", strangely enough, the jury was nowhere asked in the charge to decide that ultimate fact. All it found, in response to Question No.

3, was that Hadra did not fail "*** to perform in a *satisfactory manner* his duties and obligations ***" under the 1974 agreement. Having been charged on the question of "good cause", the jury could have legitimately have been confused as to whether or not a mere "*** satisfactory ***" performance would, ipso facto, preclude cause for termination particularly in light of the divergent philosophical viewpoint as to the marketing aspects of Hadra's performance. The possibility that such confusion existed is likewise an impediment to exercise of the power of partial retrial. See *Jamison Co.* v. *Westvaco Corporation*, 530 F.2d 34 (5th Cir. 1976); *Fury Imports, Inc.* v. *Shakespeare Co.*, 554 F.2d 1376 (5th Cir. 1977); *Caskey* v. *Village of Wayland*, supra, 375 F.2d 1004 (2nd Cir. 1967).

The possibility of compromise or confusion and, thus, jury dysfunction exists. Indeed Blum would challenge respondent to point to a more rational explanation. But the possibility is enough; it stands as an immovable obstacle to the power of partial retrial.

CONCLUSION

If the provisions of the 7th Amendment are the equivalent of judicial fairness, the staggering difference in the two verdicts here discloses a sufficient constitutional deprivation. That dollars-and-cents difference is secondary to a larger issue, however. No case more graphically demonstrates the precarious balance between judicial economy and the utter trampling of constitutional rights inherent in the power of partial retrial. No case better illustrates the wisdom of the caution enjoined upon the exercise of that power. This case is too interrelated and complex, the accuracy of

the jury verdict too suspect for it to be concluded that 7th Amendment rights have been accorded petitioner.

Writ of certiorari should issue because:

(i) The court of appeals has improperly applied the *Champlin* doctrine by refusing to require the necessary criteria to clearly appear prerequisite to the existence of the power; indeed, by imputing the power when those criteria clearly did not appear, *Supreme Court Rule 17(c)*, and

(ii) the court of appeals has likewise held contrary to other courts of appeals (including decisions of its own) by deciding that the inadequate damages in the first trial do not, as a matter of law, evidence compromise or jury malfunction. *Supreme Court Rule 17(c)*.

WHEREFORE, PREMISES CONSIDERED, petitioner prays that its petition be granted, that the case be set down for briefing and oral argument, and, upon final hearing, that the judgments of the courts below be reversed and the cause remanded for retrial. Petitioner additionally prays for such other and further relief to which it may justly be entitled at law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing petition for writ of certiorari have been served upon Mr. Marvin Johnson, 45 West Jefferson, Phoenix, Arizona 85003, by placing the same in the United States mail, properly addressed and postage prepaid, on this the 5th day of March, 1981.



MIKE A. HATCHELL

APPENDICES

Appendix A: **The Opinion of the Court of Appeals.**

Appendix B: **District Court Order Granting New Trial in First Suit.**

Appendix C: **District Court Memorandum Opinion and Order on Motion for Judgment NOV &/or New Trial After Second Trial.**

Appendix D: **The Judgment of the District Court on the First Trial.**

Appendix E: **The Judgment of the District Court on the Second Trial.**

Appendix F: **Court of Appeals Judgment; Orders on Rehearing.**

APPENDIX A

IN THE

United States Court of Appeals

FIFTH CIRCUIT

DEC. 17, 1980

NO. 79-1012

CARL M. HADRA,
Plaintiff-Appellee,

v.

HERMAN BLUM CONSULTING ENGINEERS,
a Texas Corporation,
Defendant-Appellant.

Richard L. Arnold, Dallas, Tex., for defendant-appellant.

Marvin Johnson, John P. Otto, Phoenix, Ariz., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GODBOLD, SIMPSON and THOMAS A. CLARK, Circuit Judges.

GODBOLD, Circuit Judge:

Plaintiff Hadra recovered on his claim for wrongful discharge by defendant Blum and successfully defended against Blum's counterclaim alleging fraud by Hadra in the sale of his business to Blum. We find all issues in Hadra's favor and affirm.

Dealing between Hadra and Blum began in 1972 when Hadra sold his engineering consulting firm in Phoenix, Arizona, to Blum and began working for Blum. In late 1974, under the terms of a new contract, Hadra and his family moved to Tehran, Iran, so that he could manage Blum's operations in Iran and seek new contracts there for Blum. On July 22, 1975, Blum terminated Hadra's duties in Iran and offered him a position as a project engineer in Dallas. Hadra rejected this offer, however, and moved his family to Majorca, an island off the coast of Spain. Hadra's employment contract with Blum expired by its own terms January 31, 1976. Hadra stipulated that he did not begin to look for new employment until his return to the United States in August 1976.

In the first trial of this case the district court directed a partial verdict for Hadra, holding that the statute of limitations had run on Blum's claim that Hadra fraudulently misrepresented the business prospects of his engineering firm. On the remaining issues the jury found, in response to interrogatories, that Hadra had satisfactorily performed his duties in Iran, that Blum had not reassigned him to Dallas, and that Blum owed Hadra $4,500 for unreimbursed business expenses. Also, to an interrogatory asking the amount of damages suffered by Hadra from Blum's breach of Hadra's employment contract, the jury answered "$0." The district court entered judgment for Hadra in the amount of $24,500, including $4,500 for unreimbursed expenses and $20,000 for the unpaid balance owed by Blum for Hadra's engineering firm in Phoenix.

Hadra moved for a new trial, which the district court granted in part, limiting the new trial to the issue of

damages that Hadra had suffered through January 1976 because of Blum's breach of the employment contract. The court held that the award of $0 was inappropriate because the evidence would not support an inference that Hadra reasonably could have mitigated all of his contractual damages.[1]

In the second trial the jury found that Hadra had the right to receive $97,205.10 under the terms of his employment contract and that he could not have earned any money in the exercise of reasonable diligence in other employment between July 22, 1975, and January 31, 1976. The district court awarded Hadra $121,705.10, including the contractual damages and the damages awarded in the first trial, plus 6% interest thereafter.

[1, 2] Blum urges first that the district court should not have granted Hadra a new trial on the ground of lack of proof of failure to mitigate. A district court's ruling on a motion for new trial will usually stand absent an abuse of discretion, but closer scrutiny is re-

1. The trial judge explained in his order that there was evidence from which the jury could have inferred that Hadra could have mitigated his damages in part and had failed to do so; but that there was not evidence permitting an inference that he could have totally mitigated and had failed to do so, and that absent such a permissible inference the verdict of zero damages could not stand.

> [w]ithout analyzing the evidence in detail, it was defendant's burden, after a showing of contractual breach by defendant, to establish the possibility of mitigation and the amount by which mitigation was possible. The Court feels that the jury, based upon the evidence before them, could have inferred that plaintiff might have mitigated within some time after he was terminated, but could not have inferred that the amount by which he could [have] mitigated would have equaled or exceeded the lower limit of his contractual damages.

quired in reviewing a district court's order granting a new trial on the ground that the jury's verdict was based on insufficient evidence. *See Spurlin v. General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976); *Massey v. Gulf Oil Corp.*, 508 F.2d 92 (5th Cir. 1975). A new trial is required where there is no evidence supporting the jury's verdict. *See Parker v. Wideman*, 380 F.2d 433 (5th Cir. 1967); *cf. Urti v. Transport Commercial Corp.*, 479 F.2d 766, 769-70 (5th Cir. 1973); *Indamer Corp. v. Crandon*, 217 F.2d 391, 393 (5th Cir. 1954) (refusal to order a new trial in such circumstances error of law).

[3-5] Under Texas law the defendant has the burden of proving the amount of money that a wrongfully discharged employee could have earned in mitigation of damages. *See A. J. Foyt Chevrolet, Inc. v. Jacobs*, 578 S.W.2d 445, 447 (Tex.Civ.App. 1979); *Mr. Eddie's, Inc. v. Ginsberg*, 430 S.W.2d 5, 9 (Tex.Civ.App.1968), *writ ref'd n.r.e.*. Blum urges that there was evidence supporting an inference that Hadra could have mitigated all damages flowing from the breach of contract. There was no such evidence. There was no substantial evidence of the amount of money that Hadra could have earned; indeed Blum implicitly concedes in its brief that the only evidence of the amount that Hadra could have earned after breach was Hadra's own testimony that he actually earned a few thousand dollars working as a consultant while he was in Majorca. Our Brother Clark suggests that the district court was in error because of the offer to Hadra of a position as project engineer in Dallas. This argument presupposes that there was evidence on the basis of which the jury could find that the Dallas position was comparable to the job in Iran and

that the salary for the Dallas position was at least as great as that for Iran. Blum concedes that the Dallas position entailed less responsibility because it did not carry management duties as did Hadra's job in Iran. There was no evidence of what the salary would have been for the Dallas job.[2] Moreover, Blum's contention that the Dallas offer was evidence relating to mitigation is new on appeal. Its position at trial was it had not breached the employment contract — because it had never fired Hadra but merely transferred him by reassigning him to an equivalent position in Dallas and that, under the employment contract, it could do this. The jury rejected this contention. The theory that the offer of the Dallas position was evidence of available post-breach employment to be considered in mitigation of damages was not presented to either judge or jury at the trial. It may not be considered on appeal in the absence of a manifest miscarriage of justice. *See Alabama Great Southern Railroad Co. v. Allied Chemical Corp.*, 501 F.2d 94, 103 (5th Cir. 1974), *opinion adopted by court en banc*, 509 F.2d 539 (5th Cir. 1975). There is no such injustice here. Thus the offer of a position in Dallas was not evidence tending to discharge Blum's burden of proving the amount of money that Hadra could have earned.

[6] The district court did not err in granting a new trial only as to damages arising from the breach of the

2. Blum argues that the jury reasonably could infer that it would have paid Hadra the same salary he had always received and that there would have been no break in other employment benefits in the Dallas position. This would have been a conclusion based upon speculation rather than evidence, and also would have ignored the revealed differences between compensation for employment in Iran and stateside employment.

employment contract. Blum urges that the jury in the first trial did not find that Hadra had been wrongfully discharged and, therefore, this issue should have been retried. That jury did find, however, that Hadra has substantially performed his duties in Iran and that Blum had not reassigned him to Dallas. Under Texas law these findings mean that Hadra was wrongfully discharged. *See Dixie Glass Co. v. Pollak*, 341 S.W.2d 530, 542 (Tex.Civ.App.1960), *writ ref'd n.r.e.*, 347 S.W.2d 596 (Tex.1961) (finding of substantial performance leads to inference of dismissal without good cause).

[7] Blum argues that the issues of wrongful discharge and damages are so interwoven that it was inherently unjust to order a new trial only of the latter. *See Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931); *Williams v. Slade*, 431 F.2d 605, 608-09 (5th Cir. 1970). Blum also suggests that a complete new trial was required because the first jury's answers were the result of a compromise. *See Hatfield v. Seaboard Air Line Railroad Co.*, 396 F.2d 721 (5th Cir. 1968). Blum, however, points to no circumstances, such as those listed in *Hatfield*, that indicate the possibility of a compromise verdict and concedes in its brief that jury misconduct was unlikely here. Moreover, the question of whether Hadra was wrongfully terminated is separate from the issues of how much he would have made under his contract and could have made in other reasonably obtainable employment. Thus where, as here, the jury's findings on questions relating to liability were based on sufficient evidence and made in accordance with law, it was proper to order a new trial only as to damages. *See Gasoline Products Co. v. Champlin Refining Co., supra;*

Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 281-83 (5th Cir. 1975); *Parker v. Wideman, supra*, 380 F.2d at 437.

[8] Blum challenges the district court's charge to the jury in the second trial on the issue of mitigation, contending that it was prejudicial error to instruct that: (1) Hadra had a duty, at least for a reasonable time after his discharge, only to seek employment comparable to his previous job; (2) after that time he had to seek and accept any work for which he was qualified; and (3) he was not required to consider opportunities unreasonably distant from his usual place of employment. These limitations are derived from long-standing Texas law and are not error. *See, e.g., Kramer v. Wolf Cigar Store Co.*, 99 Tex. 597, 91 S.W. 775 (1906); *San Antonio & A. P. Ry. Co. v. Collins*, 61 S.W.2d 84 (Tex. Comm. App. 1933); 38 Tex. Jur.2d, Master & Servant § 22. These limitations on the concept of "reasonable diligence" were not eliminated by the more general statements in *Dixie Glass* and *Mr. Eddie's, supra*, where limitations such as these were not at issue. Moreover, the decision in *Kramer* was by the Texas Supreme Court and not subject to being overruled by Court of Civil Appeals cases cited by appellant.

Under the above instructions the jury necessarily found that the United States (and Texas in particular) is unreasonably distant from the place of employment, or that the Dallas position was not "comparable" to the job in Iran, or it found both. We see no basis on which to predict that Texas would change its law of mitigation and hold that when one has lived in the United States and is employed to work outside the

United States and is fired in breach of contract he must, as a matter of law and, without regard to distances involved, mitigate by returning to the United States and accepting employment. Nor can we predict that Texas would amend its mitigation law by holding that for such a person, as a matter of law, salary subject to United States income tax is "comparable" to salary not subject to United States income tax.

[9] Blum asserts that the district court erred in refusing to order remittitur because the parties had stipulated that Hadra's annual salary in Iran was $50,000. This argument ignores that it was also stipulated that Hadra was to receive $50,000 per year in expenses, Hadra's wife was to be paid $30,000 annually, and compensation under the employment contract was to be allocated in a manner that minimized Hadra's tax liability. Reading these stipulations together, the district court correctly held that the jury could reasonably infer that the entire $130,000 due annually under the contract was actually meant to be compensation to Hadra.

[10] The district court did not err in awarding prejudgment interest from the date that the employment contract ended. *A. J. Foyt Chevrolet, Inc., supra,* recently upheld such an award in a case involving issues of wrongful discharge and mitigation. *See also Watkins v. Junker,* 90 Tex. 584, 40 S.W. 11 (1897); *McDaniel v. Tucker,* 520 S.W.2d 543 (Tex. Civ. App. 1975); *Beck v. Lawler,* 422 S.W.2d 816 (Tex.Civ.App. 1967), *writ ref'd n.r.e.* (interest due when "measure of recovery is fixed by the conditions existing at the time the injury is inflicted ...."); *cf. Mr. Eddie's, Inc. v. Ginsberg, supra* (award of prejudgment interest not

error in case of wrongful discharge in absence of exception). *Winandy Greenhouse Construction, Inc. v. Graham Wholesale Floral, Inc.*, 456 S.W.2d 470 (Tex.Civ. App.1970), *no writ*, and the other cases cited by Blum are distinguishable on their facts and contrary to the weight of Texas authority.

[11] Finally, Blum urges that its claim that Hadra fraudulently misrepresented the business prospects of his Phoenix firm was not barred as a matter of law by the two-year statute of limitations. Mr. Blum, however, stated to the court that he was aware in May 1973 that Hadra's projections did not seem to be correct and that the firm was not generating as much money as expected. That knowledge should have been enough to cause a reasonably prudent person to inquire further. Thus, the limitations period began to run at that time, *see Susanoil, Inc. v. Continental Oil Co.*, 519 S.W.2d 230, 238 (Tex.Civ.App.1975), *writ ref'd n.r.e.*, and expired long before Blum raised the issue of fraud as either an affirmative defense in February 1976 or a counterclaim in February 1977.

AFFIRMED.

THOMAS A. CLARK, Circuit Judge, dissenting:

Respectfully, I dissent, I disagree with the majority's handling of two of the issues raised on appeal by Herman Blum Consulting Engineers. First, in my view, the district court erred in granting Carl Hadra's motion for a new trial. Second, even if the grant of a new trial was appropriate, the district court's charge to the jury in the second trial on the issue of mitigation of damage was inadequate as a matter of law thereby substantially prejudicing Blum's defense.

In granting Hadra's motion for a new trial, the district court ruled that once the jury in the first trial found that Blum had breached his employment contract with Hadra, the jury could not, under the instructions it was given and the evidence adduced at trial have determined that Hadra was not entitled to damages for lost salary.[1] In reviewing the district court's ruling, I agree with the majority opinion that this court's decision in *Massey v. Gulf Oil Corporation*, 508 F.2d 92 (5th Cir. 1975), should guide us:

> Our review of an order granting a motion for new trial is somewhat broader than review of an order denying a motion for new trial.
>
> We [have] noted that where the judge denies the motion and leaves undisturbed the jury's determination, all factors press in the direction of leaving the trial judge's ruling undisturbed. But where the judge has granted a new trial, the factors oppose each other. Deference to the trial judge is subjected to opposing tension of deference to the jury as the body to whom fact finding is constitutionally allocated and

1. In its order granting a partial new trial, the district court stated in pertinent part:

> The court has concluded that the jury could not, under the instructions it was given, have properly reached the conclusion that an award of $0 was appropriate, based upon the evidence adduced at trial. Without analyzing the evidence in detail, it was defendant's burden, after a showing of contractual breach by defendant, to establish the possibility of mitigation and the amount by which mitigation was possible. The court feels that the jury based upon the evidence before them could have inferred that plaintiff might have mitigated within some time after he was terminated, but could not have inferred that the amount by which he could mitigated [sic] would have equalled or exceeded the lower limit of his contractual damages.

> deference to the decision which the jury has reached pursuant to that authority. Furthermore, where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise closer scrutiny than where the ground is that some undesirable or pernicious influence has intruded into the trial, because to an extent the judge has substituted his judgment of the facts and credibility of witnesses for that of the jury. Thereby we protect the litigants' right to jury trial.

Id., at 94-95.

I part company with the majority, howeven, when it concludes that a new trial was required in this case because there was no evidence to support an inference by the jury in the first trial that Hadra could have mitigated his damages resulting from the breach of the employment contract. Upon review of the record, I am convinced that the jury in the first trial had ample evidence to support its verdict.

Blum terminated Hadra's assignment in Teheran, Iran, on July 22, 1975. Hadra was advised of his dismissal by a letter from the firm's president, Herman Blum, which was hand delivered to Hadra by Blum's marketing manager, Mr. Ken Wallace. The termination letter read as follows:

> July 2, 1975
>
> Mr. Carl Hadra
> C/O Iran Electronics Industries
> Box 66/1500
> Saltanatabad, Teheran, Iran
>
> Dear Carl:
>
> A decision has been made by Herman Blum Consulting Engineers, Inc. to terminate your employment

in Iran upon the delivery of this letter to you by Ron Wallace effective immediately.

Simultaneously, we terminate reimbursement [sic] for any and all allowances and expenses. We request you hand over to Mr. Wallace all Herman Blum Consulting Engineers, Inc. credit cards.

We simultaneously offer you employment in our Dallas office in the position of Project Design Engineer under the direction of Mr. Fernando Meneses.

Should you accept this position and stay employed with us for 12 months after arrival in Dallas, we will then reimburse you for reasonable moving expenses.

Yours very truly,
HERMAN BLUM CONSULTING
ENGINEERS, INC.

By: /S/_____
Herman Blum, President

In evaluating Blum's motion for a new trial the key question is whether there was adequate evidence presented at the first trial to support the jury's conclusion that Hadra could have mitigated all of his damages resulting from Blum's breach of the employment contract. "Could have mitigated" required Hadra to make some effort to seek employment. As stated in the majority opinion, Hadra stipulated that he did not begin to look for new employment until his return to the United States in August, 1976. Hadra testified that he chose to remain overseas, jobless, until the summer of 1976 so that he could take advantage of federal income tax provisions which provide favorable tax treatment for American expatriates who live and work

overseas for an extended period. Thus, Hadra apparently hoped to reduce his U.S. income taxes on the approximately $50,000 in total compensation which he had received from Blum Consulting Engineers prior to his discharge on July 22, 1975. Of course, while sojourning on Majorca, a Mediterranean resort island off the coast of Spain, Hadra also permitted his possible claim against Blum to accrue for last compensation from July 22 until January 1, 1976. Although there was significant disagreemnt at trial over how much of the $130,000 annual total compensation package was actually Hadra's salary, it is clear that while in Teheran his salary was significantly higher than it had been in this country apparntly because of the extremely high cost of maintaining a satisfactory American lifestyle in Iran.

Hadra obtains here that which we all dream about — enjoying our cake and it being there after the feast. As the result of the new trial on damages only, Hadra spent a year relaxing on Majorca, received the $97,205.10 in salary and expenses for the remainder of the unexpired employment contract and avoided federal income taxes. The Texas jurors hearing this evidence had ample evidentiary basis for the zero verdict, believing as I do that Hadra should have accepted the job offer from Blum, returned to Dallas and paid his income taxes. If Hadra had not wanted to work for Blum, he could have returned and obtained a comparable position at a city of his choice, as he did in Los Angeles after returning in 1976. In my view the jury took a common sense view of what was fair between the parties and the district court erred in ruling that there was no basis for the zero verdict.

At the first trial the jury was given special interrogatories to answer. Question number two asked: "Do you find from a preponderance of the evidence that in July 1975, Blum Engineering reassigned Hadra to Dallas, Texas?" The jury answered that Blum "did not reassign" Hadra to Dallas. However, while Hadra may not have been "reassigned" to Dallas, the letter reproduced above clearly indicates that Blum Engineering did offer Hadra a new position back at the firm's headquarters in Dallas. It was perfectly reasonable for the jury to find, as it apparently did, that although Blum did not reassign Hadra to Dallas, it did make Hadra a good faith offer of new employment at the Dallas office. This conclusion is perfectly reasonable when one considers the nature of the employment relationship between Hadra and Blum. Hadra was working for Blum in Teheran under the terms of an employment contract. The terms of that contract stated that Hadra was to represent Blum Engineering in its efforts to expand its business with the Iranian government. Hadra was hired under the contract to work only in Iran. Unlike the typical employer-employee relationship in which an employer may reassign his employee to a new work location, the contract in dispute here would not permit Blum to reassign Hadra to its Dallas office. Thus, although the jury found that Hadra was not reassigned to Dallas, it is quite clear from the record that Blum had offered Hadra a comparable job back in this country.

The majority concludes that the jury could not have considered the Dallas job offer as evidence relating to Hadra's duty to mitigate because Blum did not present this "theory" to the jury. I can see no reason why the

jury could not or should not have considered the evidence relating to the Dallas job offer in determining whether Hadra had fulfilled his duty to mitigate. In my view, the "theory" was presented to the jury in the first trial. Just as the majority acknowledges in its statement of facts, it is abundantly clear that Hadra was offered a new job with the firm back in Dallas.

In addition to the offer included in the termination letter set forth above, the jury also heard testimony concerning the job offer. Herman Blum testified that his firm offered Hadra a Dallas job because the firm "had a heavy workload in Dallas and needed his engineering expertise."[2] Furthermore, Blum explained that he had conditioned the reimbursement of Hadra's reasonable moving expenses from Teheran to Dallas on Hadra's remaining with Blum Consulting Engineers because Blum had accidentally heard that Hadra was trying to negotiate an employment contract with another firm and Blum did not want to pay Hadra's moving expenses back to Dallas then have Hadra resign shortly thereafter.

I submit that the jury in the first trial had sufficient evidence before it to support its finding that Blum Consulting Engineers had met its burden on the mitigation of damages issue and that Hadra had failed completely to mitigate his damages resulting from his wrongful discharge.

At the second trial, the trial judge gave the following charge to the jury on the issue of mitigation of damages:

> After an employment contract has been breached, the employee has a duty to mitigate damages. That

2. Tr.Vol. III, at 147.

means that the employee must exercise reasonable diligence in seeking employment of the same or similar quality as the wrongfully terminated employment for a reasonable time. The employee may exercise reasonble diligence by seeking employment which pays a comparable salary and which consists of a position of similar prestige as the wrongfully terminated employment.

However, after a reasonable time, the employee must seek and accept any employment for which he is qualified. In the exercise of reasonable diligence, an employee must consider all opportunities for the kind of employment which he has a duty to seek, whomever the employer, *provided the place of employment is not a geographical area unreasonably distant from his usual place of employment.* (Emphasis added.)

This jury charge was not given at the first trial. The majority upholds the jury charge on the basis that the limitations on the duty to mitigate, including the geographical limitation, "are derived from long-standing Texas law and are not error." The majority cites as authority *Kramer v. Wolf Stores Co.*, 99 Tex. 597, 91 S.W. 775 (1906), and *San Antonio & A. P. Ry. Co. v. Collins*, 61 S.W.2d 84 (Tex.Comm.App.1933). My view is that under the circumstances of this case Texas law would not narrow Hadra's duty to search for new employment to an area not "unreasonably distant from his usual place of employment," i.e., Teheran.

The district court's charge had the effect of limiting Hadra's efforts to secure new employment to only Teheran or somewhere else in Iran. Therefore, under the charge as given the jury would not have been

allowed to consider Hadra's job opportunities back in the United States in evaluating where he had satisfied his duty to mitigate.

The cases relied upon by the majority are an insufficient basis on which to support the geographical limitation on the duty to mitigate. *Kramer* was an action brought by a wrongfully discharged employee who had served as a cigar store manager in the Dallas area beginning in 1902. There the evidence indicated that, once discharged, the ex-cigar store manager had

> made no effort to secure any other employment after his discharge and before he went into business for himself, for the reason, as he states, that he knew that the attempt to secure employment of the same character as that which he had of defendant would be useless as there were none such open in Dallas.

91 S.W. at 777. However, although the Texas court did not hold that a discharged employee must secure "by reasonable diligence .... another position of substantially the same character and grade as that which he had held," the court made no specific mention that the former cigar store manager could restrict his job seeking efforts to the Dallas area only.

In *San Antonio & A. P. Ry. Co. v. Collins*, *supra*, the employee was discharged in 1921 from his position as a switchman for the railroad company at its yards in Houston. Although the company offered the worker a job at either the San Antonio or Kennedy railroad yards, Collins refused and eventually filed suit. Acknowledging a wrongfully discharged employee's general duty to mitigate as stated in *Kramer*, the court in *San Antonio & A. P. Ry. Co.* held that Collins satisfied his

general duty to mitigate by "making a reasonable effort to secure other employment at Houston; and his refusal to accept employment at distant places, involving change of residence and loss of position and security in the Houston yards, was within his rights under the contract." 61 S.W.2d at 89.

However long-standing the Texas law as stated by *Kramer* and *San Antonio & A. P. Ry. Co.* may be, neither case addresses the geographical limitation on the duty to mitigate in the context of modern sophisticated employment relationships between large firms engaged in multinational operations and their thousands of American expatriate employees who serve their companies abroad. In this age when American businesses are actively engaged in overseas business ventures such as oil exploration, mining, and construction projects of all kinds in all parts of the world, it is unrealistic to conclude from the authority relied on by the majority that Texas law would require a wrongfully discharged expatriate employee to search for new employment *only* in the vicinity of their former foreign assignment.

But that is just what happened in this case. The trial court effectively forced the jury in the second trial to ignore job opportunities that Hadra had in the United States in its consideration of his duty to mitigate. In my opinion, Texas law would require that an expatriate employee who loses his overseas job and is unable to secure comparable employment in the general vicinity of that overseas assignment should return to his home in this country, within a reasonable period of time and undertake serious efforts to secure employment here. Application of the geographical limitation

to the duty to mitigate under the circumstances of this case necessitates an illogical, unnecessary result.

I would hold that the district court erred in granting the appellee's motion for a new trial. I would vacate the verdict of the jury in the second trial and reinstate the jury's verdict from the first trial. Failing that, I submit that the trial judge's charge to the jury in the second trial on the issue of mitigation unfairly prejudged the appellant, necessitating a new trial on the issue of damages.

APPENDIX B

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARL M. HADRA,

Plaintiff

v.

HERMAN BLUM CONSULTING ENGINEERS,
a Texas Corporation,

Defendant

CIVIL ACTION NO. CA-3-75-1041-D

ORDER

Came on for consideration Plaintiff's Motion for New Trial of March 6, 1978. The court is of the opinion, after review of the briefs and the arguments of counsel, that the Motion should be granted.

The court has concluded that the jury could not, under the instructions it was given, have properly reached the conclusion that an award of $0 was appropriate, based upon the evidence adduced at trial. Without analyzing the evidence in detail, it was defendant's burden, after a showing of contractual breach py defendant, to establish the possibility of mitigation and

the amount by which mitigation was possible. The court feels that the jury based upon the evidence before them could have inferred that plaintiff might have mitigated within some time after he was terminated, but could not have inferred that the amount by which he could mitigated would have equalled or exceeded the lower limit of his contractual damages. Accordingly, a new trial is appropriate. The court will limit the issue to be tried to: the damages plaintiff suffered as a result of defendant's breach of the employment contract through January, 1976.

Trial of this issue is set on the jury docket for July 17, 1978, at 9:30 A.M.

It is so ORDERED.

Dated this 23rd day of April, 1978.

United States District Judge

APPENDIX C

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARL M. HADRA,

Plaintiff

v.

HERMAN BLUM CONSULTING ENGINEERS,
a Texas Corporation,

Defendant

CIVIL ACTION NO. CA-3-75-1041-D

MEMORANDUM OPINION AND ORDER

Came on for consideration Defendant's Motion for Judgment N.O.V., or in the Alternative, Motion for New Trial. Plaintiff's Motion for Judgment Re: Income Tax Loss, and Plaintiff's Motion to Enter Judgment for Prejudgment Interest.

DEFENDANT'S MOTION FOR JUDGMENT N.O.V., OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Defendant contends that the court erred in permitting the jury to consider the $30,000 allocated in plaintiff's employment agreement to his wife's salary, and the

$50,000 allocated therein to expenses, in determining plaintiff's damages. Defendant argues that plaintiff's stipulation that "(i)t was agreed that Hadra's salary while in Iran was to be $50,000.00 per year plus $50,000.00 expenses and Mrs. Hadra was to receive a salary of $30,000.00 per year" precludes recovery of expenses and his wife's salary as damages. Pre-trial Order at 6. The parties stipulated also that a memorandum dated October 29, 1974, from Roy Krull to Herman Blum (Blum) set forth the terms of the employment agreement, providing that it "will be couched in terms to provide the most tax benefits possible to Carl Hadra and his family." Pre-trial Order at 7-8. Thus, the stipulations do not preclude a finding that plaintiff had the right to receive all the proceeds under the contract and to allocate them in a way that would supposedly minimize taxes. The upper limit of plaintiff's recovery is the present cash value of the employment agreement to him if it had not been breached. *Dixie Glass Co. v. Pollack*, 341 S.W.2d 530, 538 (Tex. Civ. App. — Houston, 1960), *aff'd per curiam*, 347 S.W.2d 596 (Tex. 1961). The jury could reasonably have found that the present cash value of the agreement to plaintiff included the sums allocated to his wife as salary and to him as expenses and that, therefore, they were recoverable by plaintiff as damages.

Defendant further argues that, since the jury in the first trial found $4,500 damages for the "expenses . . . incurred (by plaintiff) in Iran in the performance of his duties which have not been paid by Blum Engineering," Question No. 9, Court's Charge to the Jury, the jury in this trial could not award plaintiff damages based on the $50,000 provided for yearly expenses in his employment

contract. The memorandum from Roy Krull, *supra*, also provided;

> [A]ll travel and expenses associated with the developing (sic) new business will, of course, be on a reimbursible (sic) basis. An allowance will be arrived at for other expenses associated with entertaining, etc., etc. .... Pre-trial Order at 8.

The $4,500 previously awarded plaintiff, thus, represented compensation for unreimbursed *business* expenses. The $50,000 compensation under the employment contract allocated to expenses could, therefore, have represented expenses other than business expenses, such as living expenses. The jury award of $4,500 in the first trial did not preclude consideration in this trial of the $50,000 allocated to expenses in the employment contract. Furthermore, the jury could reasonably have found that plaintiff had an absolute right to receive the $50,000 allocated to expenses and could reasonably have awarded damages based on that item of compensation absent proof of actual living expenses incurred in Iran.

Defendant also contends that plaintiff's counsel introduced "fundamental error" into the trial when, during closing argument, he quoted from a portion of Blum's deposition not admitted into evidence. In closing, plaintiff's counsel quoted Blum as saying, "[t]he total deal that I was surprised to find is the fact that Krull had agreed to pay the full $130,000 to Hadra plus additional expenses;" whereas, during cross-examination of Blum, plaintiff's counsel omitted to introduce that statement into evidence but did introduce the following testimony from Blum's deposition:

> Question: So you knew at the outset from day one, as you put it, that $130,000 was to be paid to

Hadra, was indeed a fact or an agreement between him and Krull, right?

Answer: Right.

Defendant did not object at trial to the reading of Blum's non-admitted deposition testimony during closing argument. Therefore, he can not raise this misconduct by plaintiff's counsel as a ground for new trial. *Curtis Publishing Co. v. Butts*, 351 F.2d 702, 714 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967). Furthermore, this is not a case where the error is so fundamental that gross injustice would result if a new trial was not granted. *See* Wright and Miller, Federal Practice and Procedure, § 2805 at 39. The erroneously argued deposition testimony was largely repetitive of other testimony introduced at trial indicating that plaintiff's compensation was to be $130,000 plus expenses.

Defendant next contends that plaintiff's stipulation that his "first efforts to find new employment were in August, 1976 when he returned to Phoenix, Arizona," Pre-trial Order at 11, established a breach of his duty to mitigate damages and requires entry of judgment that plaintiff take nothing. Under Texas law, the defendant employer has the burden of proving the amount of money that a wrongfully discharged employee could have earned in mitigation of damages. *Call of Houston, Inc. v. Mulvey*, 343 S.W.2d 522, 527 (Tex. Civ. App. — Houston 1961, no writ); *Copeland v. Hill*, 126 S.W.2d 567, 569 (Tex. Civ. App. — Austin 1939, no writ); *Weber Gas & Gasoline Engine Co. v. Bradford*, 79 S.W. 46, 47-48 (Tex. Civ. App. 1904, no writ). See also Annot. 44 ALR 3d 629, 639 (1972). Thus plaintiff's stipulation does not, of itself, mandate that plaintiff take nothing,

even though it does establish a breach of his duty to mitigate damages.

Defendant may reduce plaintiff's recovery only by proof of earnings which plaintiff would have received if he had properly discharged his duty to mitigate. The jury could reasonably have concluded that defendant failed to prove such earnings. The jury could reasonably have found that plaintiff had no duty to accept defendant's offer of re-employment and that he could not have worked elsewhere in Iran because he lacked a work permit. The jury could also have found that the partnership opportunity that plaintiff rejected in Arizona did not qualify as employment of the same or similar character as the wrongfully terminated employment.

In *Kramer v. Wolf Cigar Stores Co.*, 99 Tex. 597, 91 S.W. 775, 777 (1906), the Texas Supreme Court discussed measurement of the amount by which damages recoverable by an employee who makes no effort to secure other employment after discharge should be reduced. Under the rule that after a reasonable time an employee must accept any employment for which he is fitted, an employee who knows that he cannot secure employment of the same or similar character as that from which he was discharged must accept any employment for which he is suited. The amount he could have earned in such employment during the remaining term of the employment contract sued upon then becomes the measure of deduction from his damage *Id.* In the case *sub judice*, however, Hadra did not testify that he knew of no available employment comparable to that from which he was discharged. Rather, he indicated that he had made some efforts to secure comparable employment while living in Mallorca. Furthermore, the

jury was instructed that Hadra had a duty after a reasonable time to seek and accept any employment for which he was qualified. The jury could reasonably have found that Hadra did not know that he could not find comparable employment and, therefore, that he did not have a duty to seek any employment for which he was qualified before the end of the employment contract with defendant.

All other errors asserted by defendant should be overruled. Defendant's Motion for Judgment N.O.V., or in the Alternative, Motion for New Trial, should be denied.

PLAINTIFF'S MOTION FOR JUDGMENT RE: INCOME TAX LOSS

Plaintiff's motion for entry of judgment for the plaintiff in the sum of $42,000 representing the amount of damages plaintiff has suffered by virtue of his loss of the court of country income tax exclusion should be denied.

Plaintiff urges *Beggs v. Dougherty Overseas, Inc.*, 287 F.2d 80 (2d Cir. 1961) as authority for its claim for income tax loss. In *Beggs, supra*, the court applied the standard announced in the venerable case of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng.Reprint 145, to allow a wrongfully discharged employee compensation for the loss of the income tax advantage conferred by I.R.C. § 911 upon individuals who engage in foreign employment for over 18 months. The court was of the view that the parties to the employment contract had contemplated the employee's income tax advantage in entering the contract, and therefore, the damages resulting from the loss of the income tax advantage caused by the breach of the contract were forseeable and in the

reasonable contemplation of the parties. *Beggs, supra,* 287 F.2d at 83. The court is unwilling to adopt *Beggs* because it doubts whether the *damages* flowing from the loss of a tax advantage are ever forseeable. The discharged employee suffers damages only if he must pay higher taxes on the amounts ultimately recovered on a judgment than he would have paid on the earnings under the employment contract if it had not been breached. The parties to an employment contract cannot reasonably foresee what the employee's tax situation will be when, and if, he ultimately recovers a judgment. They can foretell neither the tax laws nor the employee's financial situation as of that date. *C. F. Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 236-37 (5th Cir.), *cert. denied*, 423 U.S. 839 (1975).

Even if this court did adopt *Beggs*, this case would not fall within the facts of *Beggs*. In the first trial of this case, the jury found that "the parties agreed that the (employment agreement) was to be null and void when the services to be performed by defendant under the contract with Military Industries of Iran . . . were completed and that these services were completed in January, 1976." Question No. 4, Court's Charge to the Jury. Unlike *Beggs*, where the "basic contemplated term of the employment contract was one of eighteen months," *Beggs, supra,* 287 F.2d at 83, this case involves an agreement which could, and did, terminate, prior to the running of the eighteen month period necessary to take advantage of I.R.C. § 911. Thus, the parties to the agreement could not reasonably have contemplated that plaintiff would enjoy the benefit of I.R.C. § 911 and, conversely, that he would lose this benefit if the contract was breached.

For the foregoing reasons, the court is of the opinion that plaintiff should not recover any damages attributable to the alleged loss of the out of country income tax exclusion.

PLAINTIFF'S MOTION TO ENTER JUDGMENT FOR PREJUDGMENT INTEREST

Plaintiff seeks an award of prejudgment interest as a judicially recognized item of damages, and not *eo nomine* as provided in Tex. Rev. Civ. Stat. Ann., art. 5069-1.03.[1] Texas courts allow recovery of prejudgment interest as damages upon unliquidated demands if, under the oft-stated rule, the principal damages are determinable and established at a definite time, either by rules of evidence or known standards of value. *McDaniel v. Tucker*, 520 S.W.2d 543, 549 (Tex. Civ. App. — Corpus Christi 1975, *no writ*). The award of interest as damages is not within the discretion of the court. *Colonial Refrigerated Transportation Inc. v. Mitchell*, 403 F.2d 541, 554 (5th Cir. 1968). *But see Phillips Petroleum Co. v. Adams*, 513 F.2d 355, 366 (5th Cir.) *cert. denied*, 423 U.S. 930 (1975). Although Texas courts have reached disparate results in applying the accepted rule for awarding interest as damages, *see Colonial Refrigerated Transportation, Inc., supra*, 403

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1 Plaintiff cannot recover pre-judgment interest under art. 5069-1.03 because that statute provides for recovery of interest on "all written contracts ascertaining the sum payable," and this case involves an oral contract evidenced by a written memorandum. Further, a claim based on services performed pursuant to an oral contract is not a claim on an open account within the meaning of art. 5069-1.03. King Optical v. Automatic Data Processing of Dallas, Inc., 542 S.W.2d 213, 217 (Tex. Civ. App. — Waco 1976, writ ref'd n.r.e.).

F.2d at 554, several have awarded prejudgment interest to wrongfully discharged employees. *Haggar Co. v. Rutkiewicz*, 405 S.W.2d 462 (Tex. Civ. App. — Waco 1966, *no writ*); *G & W Marine, Inc. v. Morris*, 471 S.W.2d 644 (Tex. Civ. App. — Beaumont 1971, *no writ*).

Applying the accepted rule to the instant case, the court is of the opinion that plaintiff's principal damages were determinable and established on January 31, 1976, when the employment contract sued upon terminated. Until that time, it was not determinable whether plaintiff could have mitigated his damages by earnings from employment which he had a duty to seek and accept. Not until the date of termination of the employment contract could it be ascertained that no such employment had become available after July 22, 1975, when the employment contract was breached. *See Colonial Refrigerated Transportation, Inc., supra*, 403 F.2d at 554-55; *Marion v. Layton*, 373 S.W.2d 122, 123 (Tex. Civ. App. — Amarillo 1963, *no writ*). The court is therefore of the opinion that plaintiff shall recover interest on the sum of $97,205.10 in the amount of six percent per annum[2] from January 31, 1976, to the date of entry of judgment.

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2 The court has considered, and rejected, the possibility that plaintiff should recover prejudgment interest at the rate of nine percent, the legal rate of interest which became applicable to sums payable pursuant to judgment on September 1, 1975. The court is of the opinion that art. 5069-1.03 provides the rate applicable to an award of prejudgment interest as damages.

Watkins v. Tucker, 90 Tex. 584, 40 S.W. 11 (1897) stated that "the courts have, by analogy, adopted the legal rate of interest fixed by statute as the standard by which to be governed in assessing damages for the detention of money." The *Watkins* court applied a 6 percent rate of interest but did not specify whether it derived that rate

It is so ORDERED.

Dated this 29th day of November, 1978.

United States District Judge

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from the predecessor to art. 5069-1.03 or the predecessor to art. 5069-1.05, both of which were in effect at the time of the decision. Article 5069-1.01 defines "legal interest" as "that interest which is allowed by law when the parties to a contract have not agreed on any particular rate of interest." This definition is applicable to the interest provided in both art. 5069-1.03 and art. 5069-1.05. The issue therefore is: which legal rate of interest is the appropriate analogy for an award of prejudgment interest as damages?

The Texas cases are not helpful. In Earl Hayes Rents Cars & Trucks v. City of Houston, 557 S.W.2d 316, 322 (Tex. Civ. App. — Houston (1st Dist.) 1977, writ ref'd n.r.e.), the court awarded prejudgment interest as damages at the rate of nine percent after September 1, 1975. In City of Ingleside v. Stewart, 554 S.W.2d 939, 946-47 (Tex. Civ. App. — Corpus Christi, 1977, *no writ*), however, the court affirmed an award of prejudgment interest as damages at the rate of six percent after September 1, 1975. Neither court discussed the issue of which rate to apply.

Since art. 5069-1.03 provides specifically for prejudgment interest, that provision would seem the more appropriate analogy. It would be anomolous to apply a six percent rate to prejudgment interest allowed *eo nomine* and to apply a nine percent rate to prejudgment interest awarded as damages. Until the Texas legislature remedies the current disparity in legal rates of interest, the court feels bound to apply a six percent rate to the prejudgment interest awarded in this case.

C-11

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARL M. HADRA,

Plaintiff

v.

HERMAN BLUM CONSULTING ENGINEERS,
a Texas Corporation,

Defendant

CIVIL ACTION NO. CA-3-75-1041-D

JUDGMENT

This matter came on to be heard before the Court and a jury, Honorable Robert M. Hill, District Judge, presiding, and the issues having been duly tried and the jury having duly returned its verdict.

It is ORDERED and ADJUDGED that Carl M. Hadra, plaintiff, recover from the defendant, Herman Blum Consulting Engineers:

(1) the sum of $121,705.09;

(2) interest at the rate of 6% per annum on the sum of $101,705.09 from January 31, 1976, to the file date hereof;

(3) interest at the rate of 9% per annum on (1) and (2) above from the file date hereof;

(4) plaintiff's cost of suit.

Signed this 29th day of November, 1978.

United States District Judge

APPENDIX D

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARL M. HADRA,

Plaintiff

v.

HERMAN BLUM CONSULTING ENGINEERS,
a Texas Corporation,

Defendant

CIVIL ACTION NO. CA-3-75-1041-D

JUDGMENT

BE IT REMEMBERED that in the above cause, Defendant, Herman Blum Consulting Engineers, Inc., having moved for entry of judgment based on the jury verdict that Plaintiff take nothing on his claims for lost salary; Plaintiff, Carl M. Hadra, having moved for entry of judgment on the Court's directed verdict in favor of Plaintiff as to that portion of his claim for $20,000.00 for the sale of his Phoenix business and against Defendant as to its counterclaim and set-off concerning the Phoenix business; Defendant having further moved for entry of judgment based on the Court's directed verdict and Defendant's waiver and voluntary dismissal

of his claims for office furniture and equipment, losses on the sale of his house, his boat, his car, and his furniture, loss of tax benefits, travel expenses and enhancement; and Plaintiff having further moved for entry of judgment on that portion of the jury verdict awarding him his unreimbursed expenses in the amount of $4,500.00 and it appearing unto the Court that such motions should be granted;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff, Carl M. Hadra, have and recover of and from Defendant, Herman Blum Consulting Engineers, Inc., the sum of Twenty-Four Thousand Five Hundred and no/100 Dollars ($24,500.00), and that all other claims for losses, damages, and/or expenses are hereby expressly denied and dismissed with prejudice to their refiling;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Defendant, Herman Blum Consulting Engineers, Inc., take nothing on its Counterclaim and set-off.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that all costs of Court incurred in connection with this action are assessed against the defendant, Herman Blum Consulting Engineers, Inc.

All other relief not herein specifically granted is hereby denied.

SIGNED AND ENTERED this 23rd day of February, 1978.

United States District Judge

APPENDIX E

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARL M. HADRA,

Plaintiff

v.

HERMAN BLUM CONSULTING ENGINEERS,
a Texas Corporation,

Defendant

CIVIL ACTION NO. CA-3-75-1041-D

JUDGMENT

This matter came on to be heard before the Court and a jury, Honorable Robert M. Hill, District Judge, presiding, and the issues having been duly tried and the jury having duly returned its verdict;

IT IS ORDERED AND ADJUDGED that Carl M. Hadra, plaintiff, recover from the defendant, Herman Blum Consulting Engineers:

(1) the sum of $121,705.09;

(2) interest at the rate of 6% per annum on the sum of $101,705.09 from January 31, 1976, to the file date hereof;

(3) interest at the rate of 9% per annum on (1) and (2) above from the file date hereof;

(4) plaintiff's cost of suit.

Signed this 29th day of November, 1978.

United States District Judge

APPENDIX F

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 79-1012

D. C. Docket No. 3-75-1041-D

CARL M. HADRA,
Plaintiff-Appellee,

v.

HERMAN BLUM CONSULTING ENGINEERS,
a Texas Corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before GODBOLD, SIMPSON and THOMAS A. CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

December 17, 1980

THOMAS A. CLARK, Circuit Judge, dissenting.

ISSUED AS MANDATE:

F-3

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK

December 29, 1980

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

NO. 79-1012

CARL M. HADRA,
Plaintiff-Appellee,

v.

HERMAN BLUM CONSULTING ENGINEERS,
a Texas Corporation,
Defendant-Appellant.

The following action has this day been taken in the above case:

(xxxx) AN EXTENSION OF TIME has been granted to and including

JANUARY 14, 1981*

( ) for filing appellant's/petitioner's brief.

( ) for filing appellee's/respondent's brief.

( ) for filing reply brief.

(xxx) for filing petition for rehearing — appellant

• • • • •

GILBERT F. GANUCHEAU, *Clerk*

By_____
Deputy Clerk

*Must be physically filed in this offce.

F-5

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 79-1012

CARL M. HADRA

Plaintiff-Appellee,

v.

HERMAN BLUM CONSULTING ENGINEERS,
a Texas Corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING
(JANUARY 27, 1981)

Before GODBOLD, SIMPSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

No. 80-1513

In the Supreme Court of the United States

OCTOBER TERM, 1980

HERMAN BLUM CONSULTING ENGINEERS, INC.
Petitioner,

v.

CARL M. HADRA
Respondent.

Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CASES

	Pages
Gardner v. Vogel, 237 F.Supp. 119 (D.C. Penn. 1964) ..	5
Gasoline Products Co. v. Champlin Refining Co., 51 S.Ct. 513, 283 U.S. 494, 75 L.Ed. 1188 (1931)	3, 4, 5, 7
Geffen v. Winer, 244 F.2d 375, 376	5
Hadra v. Herman Blum Consulting Engineers, Inc., 632 F.2d 1242 (5th Cir. 1980)	6
Indamer v. Crandon, 217 F.2d 391 (5th Cir. 1954)	5
Rosa v. City of Chester, PA, 267 F.2d 876 (3rd Cir. 1960)	5
Williams v. Slade, 431 F.2d 605 (5th Cir. 1970)	5
Yates v. Dann, 11 FRD 386	4

Other Authorities

Moore's Federal Practice, Second Edition, Vol. 6A	4, 5

SUBJECT INDEX

	Page
Table of Cases	ii
Statement of the Case	1
Reasons for Denying the Writ	2
Conclusion	7

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1513

HERMAN BLUM CONSULTING ENGINEERS, INC.
Petitioner,

v.

CARL M. HADRA
Respondent.

Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

STATEMENT OF THE CASE

Aside from editorialization, the Petitioner's "Statement of The Case" is substantially factually correct, with the exception of the statement on page 6 of the Petition, that "The first trial was lengthy, complex, and contentious." The trial was neither lengthy (the totality of the trial took three and one-half days with several delays caused by an unusual snow storm in Dallas, Tr.82,350),* nor was it complex. The issues submitted to the jury in an interrogatory verdict were clearly delineated and succinctly stated, with the exception of the instructions with reference to mitigation of damages. (Tr.611-629) The trial was no more contentious than that of any other jury trial at

*The Respondent adopts the Record and Transcript References used by Petitioner.

which the determination of issues of fact are disputed.

The issue submitted to the jury vis-a-vis the ending date of the contract was resolved in favor of the position of Blum, i.e., it was terminated when the Shiraz contract ended. (Answer to Interrogatory No. 4, Tr.633) There was no contention that Blum had not terminated Hadra, as this was done by the letter in evidence terminating Hadra's services in Iran and leaving him in Iran with no transportation back to the United States and revoking all of Hadra's company credit cards (Plaintiff's Exhibit 21, Tr.305-306) The only issues submitted to the jury on the contract were: Did Blum re-assign Hadra to Dallas? (Interrogatory No. 2), which the jury answered: Blum did not re-assign Hadra to Dallas (Tr.633), and whether Hadra satisfactorily performed his obligations and duties under his contract with Blum, which the jury answered in the affirmative (Answer to Interrogatory No. 3, Tr.633).

The only issue on which the jury was confused was on Hadra's duty to mitigate, if any, and the amount that he could have mitigated, if any. The other issues which originally had been involved in the lawsuit were resolved by the court and never submitted to the jury. (Tr.609)

Unfortunately the instructions of the court on mitigation of damages were not as complete as perhaps they should have been. (Tr.610-611) This was corrected by expanded instructions as to the burden of proof and the necessary elements of proof of mitigation under the Texas law in the second trial (II, 244-247).

REASONS FOR DENYING THE WRIT

Blum does not challenge the constitutional power of the trial court to grant a new trial under the provisions of the Seventh Amendment and Rule 59(a) of the Federal Rules of Civil Procedure. (Petition, p.10).

Blum instead relies on the fountainhead case of *Gasoline Products Company v. Champlin Refining Company,* 51 S.Ct. 513, 283 U.S. 494, 75 L.Ed. 1188 (1931) and its progeny. Hadra also relies upon *Gasoline Products* and its progeny as did the Court of Appeals for the Fifth Circuit below.

The cornerstone of the rule enunciated in *Gasoline Products* is:

> "Here we hold that, where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."

The Court in *Gasoline Products* went on to say that the question is "whether the issue of damages is so distinct and independent of the others arising on the counterclaim, that it can be separately tried".

The *Gasoline Products* Court in delineating the test applicable to a re-trial of one issue created the touchstone of the rule; that is, a re-trial of only one issue alone is proper if it may be had *without injustice* when it said:

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial *of it alone may be had without injustice.*" (Citations omitted) (Emphasis added)

The Court went on to determine in *Gasoline Products* that the questions of damages and liability were so interwoven in that case that the submission of one issue alone would amount to the denial of a fair trial and ordered a re-trial on both damages and liability.

Every case since *Gasoline Products* including all those cited by Blum has reiterated the rule in substantially the terms set out above.

Every case cited and relied upon by Blum makes it clear that where a re-trial may be held *"without injustice"* that a new trial on the issue of damages alone is proper and permissible.

The cases are collected and synthesized by Professor Moore in Moore's Federal Practice, Second Edition, Volume 6A, paragraph 59.06, wherein he comments on the *Gasoline Products* case:

> "Thus where in order to determine the amount of damages in a breach of contract case it might be necessary for the jury to re-find the terms of the contract, or the date of its formation, or when it was breached, a partial re-trial may not be ordered. This was the situation in the *Gasoline Products* case . . ."

In the case at hand it clearly was not necessary for the second jury to re-find the terms of the contract or the date of its formation or when it was breached. The date of the formation of the contract was undisputed. (See Plaintiff's Exhibit 18, Tr. 46, 48, 49-53) The date upon which it was breached was also undisputed as that was the date the termination letter was delivered to Hadra by Blum's representative in Iran. (Plaintiff's Exhibit 21, Tr.305-306) The term of the contract as to when it was to end was decided by the jury in the first trial in a manner adverse to Hadra and *favorable to Blum* as the earliest possible date upon which it could have terminated. (See Answer to Interrogatory No. 4, Tr.633)

Professor Moore cites with approval the discussion by Chief Judge Leahey in *Yates v. Dann,* 11 FRD 386, as a proper elucidation of the rule which was succinctly decreed in *Gasoline Products.* Judge Leahey said, in what Professor Moore describes as an "excellent opinion" the following:

> "Under Federal Rules of Civil Procedure, Rule 59, . . . the trial judge has discretion to order a partial

> new trial as to one or more issues when it appears the issue in question is severable from and not interwoven with the remaining issues. The theory behind this rule is a party who has already had his day in court as to a particular issue may not have another opportunity to relitigate the same point unless the partial new trial will result in a miscarriage of justice."

The common thread which runs through all of the cases is the issue of whether or not the issues are separable. The overriding consideration, which has now become the fabric of the rule first enunciated in *Gasoline Products* and reiterated in all of the cases cited by Blum, is when a new trial may be had as to one issue *"without injustice"* and "without unfairness", then a new trial limited to the issue of damages is proper.[1]

Williams v. Slade 431 F.2d. 605 (5th Cir. 1970) which is heavily relied upon by Blum in its petition sets forth the test that when applied to the posture of this case must necessarily result in the denial of Blum's petition. In *Williams* the court quoted with approval the holding of *Geffen v. Winer* 244 F.2d 375 at 376 (D.C. Cir. 1957), that:

> "Here it appears from the record *as a whole* that interests of justice will be best served by a new trial on all issues . . ."

Williams states the rule which is applicable here as follows:

> "The common thread which runs through these decisions is that in each case the court thought that as a result of the *totality of the circumstances* that the issues sought to be excluded by a partial new trial had not been properly determined initially even though the

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1. Cases enunciating the same rule and permitting a new trial as to damages only, by way of example only, are: *Rosa v. City of Chester, Pennsylvania,* 278 F.2d. 876 (3rd Cir. 1960); *Gardner v. Vogel,* 237 F.Supp. 119 (D.C. Penn. 1964); *Indamer v. Crandon* 217 F.2d. 391 (5th Cir. 1954); and those cases collected in Moore's Federal Practice, Second Edition, Vol. 6A, paragraph 59.06.

obvious error complained of related to the other issue or issues." (Emphasis supplied)

Viewing this case from the totality of the circumstances, as did the trial judge and the Court of Appeals, it is clear that the jury verdict was not the result of a compromise verdict. Indeed, the jury was specifically instructed not to decide who they thought should win and then try to answer the questions in that light. (Tr.604) Here the issue of liability was not decided by the jury but was decided by the trial court on the basis of the jury's answers to interrogatories. Under Texas law if Hadra satisfactorily performed his obligations and duties under his agreement with Blum and he was not reassigned to Dallas, then Blum had breached its contract with Hadra as a matter of law. *Carl M. Hadra v. Herman Blum Consulting Engineers, Inc.*, 632 F.2d 1242 (5th Cir. 1980) at page A6 of Appendix A to the Petition.

Here, unlike the majority of the cases cited by Blum, we are dealing with an interrogatory verdict as opposed to a general verdict and with a contract case as opposed to a negligence case.

Both the trial court and the Fifth Circuit viewed the trial from the totality of the circumstances and determined that the issues were separable and in the exercise of their sound discretion that the re-trial of the damage issue only was *neither unjust nor unfair* to Blum.

Indeed, the Petitioner conceded in its brief in the Court of Appeals below that it was unlikely that any jury misconduct occurred. (Brief of Appellant in the 5th Circuit at page 23, and *Hadra v. Blum, supra,* at page A6 of Appendix A to the Petition)

CONCLUSION

Under the Seventh Amendment, the teaching of *Gasoline Products* and its progeny and under the factual posture of this case, both the trial and appellate courts below properly determined the issue in limiting the retrial granted by the trial court to the issue of damages.

Contrary to the contention of the Petitioner, the trial court and the Fifth Circuit Court of Appeals properly applied the doctrine of *Gasoline Products*. It is a question of fact committed to the discretion of the trial court as to whether the issues are separable and whether one issue could be retried without injustice.

There is no conflict among the circuits as to the rule of *Gasoline Products*. Inadequate damages do not constitute a compromise or jury malfunction requiring a re-trial of all issues as a matter of law as contended by Petitioner.

The Petitioner has asked this Court to substitute its judgment of the facts and discretion for that of both the trial and appellate courts below. It is respectfully submitted that such is not the function of a Petition for Certiorari and accordingly it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing Response to Petition for Writ of Certiorari have been served upon Mike A. Hatchell, Esq., P.O. Box 629, Tyler, Texas 75701 by placing the same in the United States mail, properly addressed and postage prepaid, on this the ..... day of March, 1981.